No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

RESPONSE OF THE UNITED STATES TO THE JOINT MOTION FOR A DETERMINATION OF PRESENT PERFECTED RIGHTS AND ENTRY OF A SUPPLEMENTAL DECREE

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The United States agrees that a Motion for Determination of present perfected rights is appropriate under Article VI of the decree entered in this case on March 9, 1964, 376 U.S. 340, and amended on February 28, 1966, at 383 U.S. 268. Article VI provides that if the parties are unable to agree "on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court." As stated by movants here, although the parties have now reached substantial accord on many points—including the subordination agreement incorporated in the movants' proposed supplemental decree—despite a concerted effort, they are unable to conclude a complete agreement regarding the present perfected rights.

1. The United States does not oppose the entry of the proposed supplementary decree provided that paragraphs 4 and 5 are modified as follows. Proposed paragraph 4 (Motion, p. 4) should be amended to provide that—

> Any water right listed herein may only be exercised for beneficial uses.

The deletion of the qualifying term "reasonable" brings this provision into conformity with the discussion of the beneficial use restriction on the exercise of present perfected rights in this Court's earlier opinion, 373 U.S. at 584, and in Article I(G) of the decree, 376 U.S. at 341. If the addition of the phrase "and reasonable" qualifies or limits the exercise of present perfected rights, its inclusion is unwarranted by either this Court's opinion or its decree. And, if it adds nothing to the limitation "to beneficial" uses already recognized by this Court (376 U.S. at 341), it should be deleted to avoid ambiguity on this point.

Paragraph 5 (Motion, pp. 4-6) should be amended to read as follows:

> (5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B) (3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D) (1)-(5) of said Decree, *provided that the quantities fixed in*

paragraphs (1) through (5) of Article II (D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of main stream water necessary to supply the consumptive use required for irrigation of the irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary. The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and as that provision is included within paragraphs (1) through (5) of Article II(D) of said Decree, shall constitute a means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application. The quantities of such diversions are to be computed by determining net practicably irrigable acres within each additional area using methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

Indian Reservation	**Unit Diversion Quantity Acre-feet Per Irrigable Acre**
Cocopah (Arizona)	6.37
Colorado River (California)	6.67
Chemehuevi (California)	5.97
Ft. Mojave (California)	6.46

> Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (rights numbered 7-21 and 29-80 below) shall be satisfied. Furthermore, nothing in this paragraph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified.

The amendment proposed by the United States (indicated in italics)[1] follows the language of the prior opinions and orders of this Court, and eliminates certain undesirable limitations on the subordination provision proposed by movants.

The proposed amendment incorporates the language of Article II(D)(5) of the decree entered on March 9, 1964 (376 U.S. at 345), which provides that the quantities adjudicated to certain reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." The version proposed by movants, in contrast, applies only to additional present perfected rights based upon "orders of the

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[1]The following language contained in the movants' proposed supplemental decree has been deleted:

> plus such additional present perfected rights as may be hereafter established by decree or future stipulation that are based upon orders of the Secretary of the Interior enlarging the boundaries of said reservations that have been issued between the date of said Decree and May 2, 1977. However, such additional rights to diversions of mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of the additional practicably irrigable acres within the additional areas resulting from the enlarged boundaries. [Motion, p. 5].

Secretary of the Interior enlarging the boundaries of said reservations." That language is objectionable, first, because the Secretary of the Interior is not seeking to "enlarge" these reservations by order, although with respect to these disputes he may make determinations of what was intended by prior orders, statutes or treaties establishing reservations. More importantly, the boundary disputes covered by this provision should not be limited to those involving Secretarial orders. For example, one matter specifically discussed by the parties during negotiations related to a boundary dispute involving the Cocopah Reservation. The Cocopah sued the Secretary of the Interior for a determination that certain described lands immediately adjacent to the Colorado River in Arizona were held by the United States in trust for the tribe. That litigation, *Cocopah Tribe* v. *Morton*, No. CV-70-573-PHX-WEC, decided May 12, 1975 (D.C. Ariz.), resulted in a decision for the tribe. Similarly, litigation on behalf of the Colorado River Tribe has resulted in determinations that substantial parcels of land in California, which were discussed by the Special Master in this case, contrary to his recommendations, are a part of the Colorado River Reservation. The amendatory language proposed by the United States applies to cases such as these, as well as those involving only Secretarial orders.

The amended paragraph proposed here also eliminates the language limiting the claims covered by the subordination clause to those based upon a determination of the Secretary prior to May 2, 1977. The prior discussions and partial agreements between the parties did not contemplate that the scope of the subordination should be so limited, and we know of no basis for imposing such a restriction.

2. The United States does, however, oppose the entry of the proposed supplemental decree without the amendments discussed above, and recommends the appointment of a special master to determine the present perfected rights. The United States has no objection to the dates of priority and amounts of annual diversion allowed in the proposed decree for the various state water districts and projects, if they are part of a comprehensive stipulation effecting a complete settlement. However, if the amendments proposed above are not made and thus no agreement satisfactory to the United States is reached, the United States is entitled to require a showing of the proofs that support the claims to which it gave tentative approval as part of an overall settlement.

The United States urges that the Motion for a Determination be granted, and that the Supplemental Decree proposed by the movants, amended in accordance with the proposals in this response, be entered by the Court. In the alternative, the United States recommends that this matter be assigned to a special master for a hearing.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

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